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THE LAW SCHOOL. — A tablet has been put up in the reading room of Langdell Hall containing an original copper plate of a portrait of the late Professor John Chipman Gray. By gilding, the plate is preserved from rust and made into a permanent portrait. One of the etchings from this plate has been hung in the alcove in Austin Hall just above the place where for many years Professor Gray was accustomed to sit. He chose this place that he might be accessible to students seeking advice and information. The tablet and engraving are the gift of Professor Gray's family. "*Qui autem docti fuerint fulgebunt quasi splendor firmamenti et qui ad justitiam erudiunt multos quasi stellae in perpetuas aeternitates.*"

WINDING UP PROFESSIONAL PARTNERSHIPS. — The recent case of *Stem* v. *Warren* [1] in New York raises important questions concerning

[1] Two firms of architects, Reed & Stem and Warren & Wetmore, entered into a partnership agreement to devote their joint labor and talent to the performance of such architectural work as might be entrusted to them by the N. Y. Central & H. R. R. Co. in connection with the Grand Central Terminal Improvements, New York City. The profits and losses of the joint adventure were to be shared equally by the firms. Reed was to be the executive head of the work. At the same time a contract was entered into with the railroad company. It was provided in both agreements that in the event of a vacancy in the position of executive head, due to the death, resignation, or removal of Reed, the company should appoint his successor from among the associated architects. The railroad reserved the right to terminate the employment of the associated architects at any time by notice in

the rights and duties of surviving partners of professional firms dissolved by the death of a member, especially in connection with contracts for professional services made prior to the dissolution. Surprisingly few cases dealing with professional firms are found in the reports, and practically all of these have to do with law partnerships. The dissolution of a firm by the death of a partner or otherwise does not relieve the partners or their legal representatives from liability on ordinary commercial contracts.[2] If however, the contract was one for personal services, it may, under certain circumstances, be terminated. If the personal services of the deceased partner were contracted for, or his character was relied upon, the other contracting party may at his option terminate the contract.[3] A client who employs a firm of lawyers, without stipulating for the services of any particular member of the firm, has the option of terminating the contract of employment upon the death of one of the partners, on the ground that the contract impliedly entitles him to the joint activity and services of all the partners. But the option is for the client alone, and if he is willing to go on with the contract, the surviving partners are under an obligation to fulfill it.[4]

In winding up the affairs of a dissolved partnership, the general rule is well settled that the surviving partner is not entitled to any compensation.[5] The rule is subject, however, to many exceptions. Compensation

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writing. From 1904 till 1911, the firm designed numerous buildings under contracts awarded by the company. In November, 1911, Reed died, and the railroad, at the suggestion of the firm of Warren & Wetmore, terminated the employment of the associated architects, and entered into a new contract with Warren & Wetmore to complete the unfinished work. Subsequently the company awarded to the same firm the contract for the Biltmore Hotel, the preliminary plans for which had been made by the associated architects before the death of Reed. No dispute arises over the profits made up to the end of 1911. Action by Stem, as surviving partner of Reed & Stem, against Warren & Wetmore, the representative of Reed being joined as a co-defendant, for an accounting of the subsequent profits. *Held*, that Stem and the representative of Reed are entitled to share in the profits of the work assigned to the firm prior to and unfinished at the time of Reed's death; also that Warren & Wetmore should account for the use of the preliminary plans of the Biltmore Hotel to the extent of 1% of the cost of the hotel. (125 N. E. 811 (N. Y.))

[2] Ayres *v.* C., R. I. & P. R. Co., 52 Ia. 478 (1879); Rust *v.* Chisolm, 57 Md. 376 (1881); Madden *v.* Jacobs, 52 La. Ann. 2107, 28 So. 225 (1900).

[3] Strange *v.* Lee, 3 East, 484 (1803); Fulton *v.* Thompson, 18 Tex. 278 (1857).

[4] Griffiths *v.* Griffiths, 2 Hare, 587 (1843); Little *v.* Caldwell, 101 Cal. 553, 36 Pac. 107 (1894); Clifton *v.* Clark, 83 Miss. 446, 36 So. 251 (1904).

[5] The classic statement of the rule is found in Beatty *v.* Wray, 19 Pa. St. 516 (1852). The law will imply a promise, it is held, on the part of each partner to wind up the business in the event of the death of his associate. The court will not undertake to appraise the value of the services of the respective partners. "Every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and without comparison of values; for services to the firm cannot, from their very nature, be estimated and equalized by compensation of differences . . . If this be the nature of services to the firm before dissolution, it is the nature of services to the firm after it." In Colgin *v.* Cummins, 1 Port. (Ala.) 148 (1834), the court bases the rule on the fact that the property of the surviving partner has by his own act become mingled with the property of the deceased, and it is his right and his duty to do all the acts necessary to effect a separation. The harshness of the rule in certain cases was recognized in Gyger's Appeal, 62 Pa. St. 73 (1869). In North Carolina the rule has been repudiated and a surviving partner allowed compensation for his services in an ordinary case of winding up. Royster *v.* Johnson, 73 N. C. 474 (1875). The modern tendency is illustrated by Thayer *v.* Badger, 171 Mass. 279, 50

will usually be allowed when the business has been carried on over a considerable period of time in order to complete existing contracts,[6] to enable it to be closed up advantageously,[7] to preserve the good will and sell the business as a going concern,[8] or pending proceedings for winding up by the court.[9] It may also be allowed where the continuance, though unnecessary, has proved profitable.[10] Moreover, the rule denying compensation applies only to cases where the business can be wound up speedily and the surviving partner is called upon to perform only the ordinary tasks of collecting claims, paying debts, selling the property of the firm, and distributing whatever surplus may remain.[11] If in addition to these ordinary services he performs any service of an unusual or extraordinary nature, he will always be compensated therefor according to the character and value of such service.[12]

If the surviving partner, instead of winding up the business, continues it, and employs therein the assets of his deceased partner, and profits are made by such continuance, the question arises as to the proportions in which the surviving partner and the representatives of the deceased shall share in these profits. The survivor may have continued the business in the belief that he had a right so to do, or he may have been conscious of his wrongful conduct. Ordinarily one who employs the property of another wrongfully and thereby subjects it to the risk of loss is not entitled to lay claim to any part of the increase of such property. But a distinction may properly be made in partnership cases. Here the property was originally embarked in the business by its owner, and the wrong of the survivor consists in his failure to make at the proper time a segregation of this property from property of his own. Lord Eldon, in a series of cases at the beginning of the nineteenth century, established the principle

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N. E. 541 (1898), where the court, by Holmes, J., said that such questions should be dealt with on their particular circumstances rather than by absolute rules. Under the UNIFORM PARTNERSHIP ACT, § 18 (f), a surviving partner is entitled to "reasonable compensation" for his services in winding up partnership affairs.

6 Schenkl *v.* Dana, 118 Mass. 236 (1875).

7 Griggs *v.* Clark, 23 Cal. 427 (1863).

8 Cameron *v.* Francisco, 26 Oh. St. 190 (1875); Peck *v.* Knapp, 137 N. Y. Supp. 70 (1912).

9 Livingston *v.* Livingston, 26 D. L. R. 140 (1916).

10 McElroy *v.* Whitney, 12 Ida. 512, 88 Pac. 349 (1906).

11 Maynard *v.* Richards, 166 Ill. 466, 46 N. E. 1138 (1897); Lamb *v.* Wilson, 3 Neb. (Unof.) 496, 92 N. W. 167 (1902).

12 Hite's Heirs *v.* Hite's Ex'rs, 1 B. Mon. (Ky.) 177 (1841). The surviving partner managed over a number of years a large landed estate owned by the partnership, prosecuted and defended lawsuits, and disposed of the property. The court called the services extraordinary and perplexing. In Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647 (1889), the surviving partner recovered, more than twenty years after the dissolution of the firm, a large amount of money by setting up a dubious claim, which was bought off after four years of litigation. In Maynard *v.* Richards, *supra*, affirming 61 Ill. App. 336, the surviving partner gave practically all his time for six years to the prosecution of an action for breach of contract in behalf of the firm. The court held the services to be "so extraordinary and unusual as to give rise to the presumption of an implied contract. The long and successful prosecution of the suit may be regarded as service in excess of the mere winding up of the partnership business." And in Condan *v.* Callahan, 115 Tenn. 285, 89 S. W. 400 (1905), the completion of a valuable railroad construction contract by the surviving partner was held to be service in excess of a mere winding up, for which he was entitled to compensation.

that the surviving partner who continues the business and makes profits thereby is entitled, in addition to the share of the profits which he can claim because of his capital employed in the business, to compensation for his skill and services in conducting the business.[13] And the right to compensation is not contingent upon the absence of any conscious wrong on the part of the surviving partner, although his conduct is a circumstance to be considered in determining the amount of his compensation. In the middle of the century several English cases broadened the rule so as to include more than mere compensation for services. An inquiry was directed to determine how much of the subsequent profits could be attributed to the skill and services of the surviving partner and how much to the capital employed in the business.[14] It is this extended rule which the English Partnership Act of 1890[15] has probably codified. In the

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[13] Crawshay *v.* Collins, 15 Ves. Jr. 218 (1808), 2 Russ. 347 (1826). The case was before the court of Chancery for more than twenty years. On its final appearance before him, Lord Eldon said that claims for personal labor and other just allowances could be taken into consideration in the account. Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298 (1810); Cook *v.* Collingridge, Jac. 607 (1822); Brown *v.* De Tastet, Jac. 284 (1821). In this last case Lord Eldon said: "It cannot be denied that if the business be such, that on the death of the party other persons are concerned in aiding it by the application of their skill, their services, and their money, a great deal may be included under the head of just allowances."

[14] Willett *v.* Blanford, 1 Hare 253 (1842). In discussing the division of the profits made subsequently to the dissolution, Wigram, *V. C.*, said that no general rule was applicable to all the cases. "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties." In Simpson *v.* Chapman, 4 De G., M. & G. 154 (1853), Lord Turner expressed his entire concurrence in the views of Wigram, *V. C.*, which he described as "a most accurate and masterly summary of the principles by which the court is to be guided in cases of this description." And he emphasized the necessity of distinguishing clearly between the profits which were attributable to the skill and industry of the surviving partner and those due to the capital of the deceased. In Wedderburn *v.* Wedderburn, 22 Beav. 84 (1856), the business was in a precarious condition upon the death of one of the partners. Insolvency would have resulted from an attempt to wind it up immediately. Instead the surviving partners struck a book balance and found what was due to the deceased. This amount was ultimately paid to his children. They continued the business for more than thirty years, during which time the difficulties of the firm were surmounted and great profits realized, in which the children of the deceased partner claimed the right to share. The Master of the Rolls, Sir John Romilly, held that this was not a case where the profits were realized from the continuance in the business of the assets of the deceased, but rather from the great ability, skill, and reputation of the surviving partners. He concurred with Lord Turner's approval of the doctrine laid down in Willett *v.* Blanford, *supra.* But in Mellersh *v.* Keen, 27 Beav. 236 (1859) and Yates *v.* Finn, 13 Ch. Div. 839 (1880), the court reverts to the old form of stating the rule, *i. e.*, the surviving partner will be given an allowance for his services.

[15] 53 & 54 VICT. c. 39, § 42. The act provides that when the capital of a deceased or retiring partner is continued in the business, in the absence of any agreement, the retiring partner or the representative of the deceased may at his option demand interest on such capital at the rate of five per cent, or "such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets." See LINDLEY, PARTNERSHIP, 7 ed., 635: "If it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the use of the capital or assets of the late partner, his *prima facie* right to share such profits will be effectually rebutted." In Page *v.* Ratliffe, 75 L. T. 371 (1896), the court in applying § 42 gave it this interpretation and held that a considerable portion of the profits was due to the

United States the trend of recent cases is in the direction of the modern English view, and the surviving partner will be entitled to the profits which can reasonably be attributed to his ability and services.[16]

In the case of professional firms the sole source of income is usually the skill and services of the partners, and the winding up of such firms consists generally in fulfilling contracts for personal service made prior to the dissolution. Little capital is employed, and the subsequent profits can therefore be attributed almost entirely to the services of the surviving partner. If the rule mentioned in the preceding paragraph were to be applied to such cases, the bulk of these profits would go to him. The more recent American cases recognize the justice of such a division, but they go no further than to hold that the survivor is entitled to compensation for his services in completing the contracts.[17] Of course the amount

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exertions of the surviving partner and was not attributable to the share of the deceased partner's capital. The most recent case on the point is Stevenson *v.* Aktiengesellschaft, [1918] A. C. 239. A partnership between an English and a German company was dissolved by the outbreak of war, but the English partner continued to use the plant and machinery of the partnership in carrying on business. It was held that he must account to the German partner for the profits made after dissolution, but Lord Finlay, L. C., said: "The German partner is, of course, not entitled to any share of the profits attributable to the skill or industry of the English partner."

[16] Robinson *v.* Simmons, 146 Mass. 167, 15 N. E. 558 (1888). The court said: "We think a just rule to be deduced from the authorities is, that, where there are no circumstances which render its application inequitable, the profits should be divided according to the capital, after deducting such share of them as is attributable to the skill and services of the surviving partner." In *accord*, Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473 (1904); Whittaker *v.* Jordan, 104 Me. 516, 72 Atl. 682 (1908). In Phillips *v.* Reeder, 18 N. J. Eq. 95 (1866), the court refused to allow the retiring partner to participate in the subsequent profits in any degree on the ground that the main contribution to the success of the firm was the skill, time, and diligence of the partners. Interest on the capital from the date of dissolution was decreed. King *v.* Leighton, 100 N. Y. 386, 3 N. E. 594 (1885), is not opposed to these authorities. In that case the retired bankrupt partner had never contributed his personal services to the business, which was managed entirely by the partner who continued the business after the dissolution. The court properly held that the latter was not entitled to any additional compensation, since the respective contributions of the two partners after the dissolution were the same as before. The UNIFORM PARTNERSHIP ACT, § 42, follows the English Partnership Act, and allows the retiring partner or the representative of a deceased partner the option of demanding the value of his interest at the date of dissolution plus interest, or in lieu of interest, "the profits attributable to the use of his right in the property of the dissolved partnership."

[17] In Denver *v.* Roane, 99 U. S. 355 (1878), the court suggested that there might be reason for applying a different rule to the winding up of professional partnerships from the one applicable to commercial partnerships. In the case *sub judice*, however, an agreement between the partners provided for the apportionment of fees in case of the death of a partner. In Sterne *v.* Goep, 20 Hun (N. Y.), 396 (1880), the court characterized the rule as harsh which would require the surviving partner to devote his professional skill and service over a possible period of years to the closing up of pending litigation, for the benefit equally of the estate of the deceased partner. In Lamb *v.* Wilson, *supra*, the right of the surviving partner to compensation for his skill and labor is said to be founded "upon the plainest principles of equity and justice, especially when applied to partnerships among professional men, where the profits are almost wholly the result of professional skill and labor." In *accord* with these cases, Carrere *v.* Whaley, 17 S. C. 595 (1882); Justice *v.* Lairy, 19 Ind. App. 272, 49 N. E. 459 (1897); Roth *v.* Boies, 139 Ia. 253, 115 N. W. 930 (1908); Jones *v.* Marshall, 24 Ida. 678, 135 Pac. 841 (1913). *Contra*, Little *v.* Caldwell, 101 Cal. 553, 36 Pac. 107 (1894), in which the court refused to make any distinction between professional and commercial firms as regards compensation for winding up.

of such compensation may be made large enough to include all or almost all of such profits, but the rule is not phrased in such a way as to entitle the surviving partner, as a matter of law, to all of the subsequent profits. Some participation in these profits by the estate of the deceased partner seems inevitable, for the contract is itself an asset of the firm, and the estate as well as the surviving partner remains liable for the proper performance of it.[18]

In the case of *Stem* v. *Warren*, referred to above, two firms of architects, Reed & Stem and Warren & Wetmore, entered into a partnership to perform certain work awarded to the joint adventure by a railroad company. In both the partnership contract and the contract with the railroad the intention of the parties was clearly shown that the employment should not be terminated in the event of the death of the partner Reed, who was chosen as the executive head of the work. The court properly held that the death of this partner, which occurred in the course of the work, did not *ipso facto* terminate the contract between the firm and the railroad company. It lay with the railroad alone to say that the personal services of the deceased partner were so important an element in the contract as to entitle it to terminate the contract on the ground of failure of consideration. Until the railroad indicated its attitude, it was the duty of the surviving partners to continue under the old contract. The initiative taken by the firm of Warren & Wetmore in inducing the railroad company to terminate the old contract and to award it a new contract to complete the unfinished work was a gross breach of the fiduciary relation,[19] from which it very properly was not permitted to profit. But in one important respect the judgment of the court is open to serious doubt. In the accounting the firm of Reed & Stem was allowed to participate in the profits earned subsequently to Reed's death equally with the firm of Warren & Wetmore. Clearly Stem, the surviving partner of the firm of Reed & Stem, was entitled to participate in these profits to the extent originally contemplated, although, by reason of the wrongful conduct of the other firm, he did nothing to aid in completing the unfinished work. But in view of the fact that the profits earned after the death of Reed were attributable to the skill and services of the surviving partners, it seems inequitable to allow the Reed estate to share to the same extent as Reed himself would have shared had he continued to live and devote his time and talent to the work.

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[18] See McClean *v.* Kennard, 9 Ch. App. 336 (1874); Clifton *v.* Clark, 83 Miss. 446, 36 So. 251 (1904). But in the latter case the court admitted that the surviving partner might have an equitable claim for a larger share of the compensation received for his services rendered after the death of his partner.

[19] Partnership furnishes one of the strongest cases of the fiduciary relation. A surviving partner is bound to act in perfect fairness and good faith, according to the highest standard of honor. Freeman *v.* Freeman, 136 Mass. 260 (1884). A partner who clandestinely competes with the firm holds whatever he secures in trust for the partnership. Featherstonhaugh *v.* Fenwick, *supra.* He cannot upon a dissolution of the firm appropriate to himself all the partnership assets, or transfer to a third party the share of his former partner. Pearce *v.* Ham, 113 U. S. 585 (1885). Nor can a surviving partner extinguish a contract belonging to the partnership and substitute for it a contract in the profits of which he alone is to participate. Little *v.* Caldwell, *supra;* Clifton *v.* Clark, *supra.*